Narayanan v Kannamah

HIGH COURT (TAIPING) — CIVIL APPEAL NO 11-3-92(92)
ABDUL MALIK ISHAK JC
15 SEPTEMBER 1993

Land Law *— Deed of gift — Gift of state land — Whether deed founded on unlawful occupation of state land could be enforced — Illegality — National Land Code 1965 s 425*

Civil Procedure *— Pleadings — Illegality — Not pleaded by appellant — Whether court could take notice of such illegality*

Land Law *— Licence — Temporary occupation licence — Whether transferable — Whether issuance of temporary occupation licence could convert state land into alienated land*

The appellant and his family occupied premises which stood on state land and had renovated the house thereon ('the dwelling house'). The dwelling house belonged to the appellant's father although the appellant and his family had been in occupation since 1964. In 1974, the appellant's father executed a deed of gift in favour of his daughter ('the respondent') and the deed was duly attested and stamped. Notwithstanding the gift, the appellant continued to occupy the dwelling house even after the death of his father in 1981. In 1986, the respondent through her solicitors issued a notice to quit on the appellant. The trial judge gave judgment in favour of the respondent. The appellant has appealed.

Held, allowing the appeal:

(1) The trial judge failed to consider that the respondent's claim was based on illegality as the dwelling house stood on state land and the deed of gift could not have divested the dwelling house to the respondent as the occupation of the land was without lawful authority and punishable under s 425 of the National Land Code 1965.

(2) Although illegality was not pleaded by the appellant, the court would not enforce a deed of gift founded on unlawful occupation of state land which was illegal.

(3) Even if the respondent's father held a temporary occupation licence on the state land, the licence was temporary and not transferable upon the death of the appellant's father. The issuance of a temporary occupation licence will not convert state land into alienated land.

Obiter:

A party to an action may change his solicitor without a court order but until the notice of change is filed in court and the copy of it served on all parties to the action, the solicitor whose name appears on the

record will be considered the solicitor of the party until the conclusion of the action.

[Bahasa Malaysia summary

Perayu dan keluarganya menduduki premis yang terletak atas tanah kerajaan dan telah mengubahsuai rumah di atas tanah itu ('rumah kediaman itu'). Rumah kediaman itu dipunyai oleh bapa perayu walaupun perayu dan keluarganya telah menghuni rumah kediaman itu sejak 1964. Dalam tahun 1974, bapa perayu telah melaksanakan suatu suratikatan alang untuk faedah anak perempuannya ('responden') dan suratikatan itu telah diakusaksi dan dicap. Walaupun alang itu telah diberi, perayu tetap mendiami rumah kediaman itu sehingga bapanya meninggal dalam tahun 1981. Dalam tahun 1986, responden, melalui peguamcaranya, telah mengeluarkan suatu notis keluar terhadap perayu. Hakim perbicaraan telah memberi penghakiman memihak kepada responden. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Hakim perbicaraan gagal mempertimbangkan bahawa tuntutan responden berdasarkan kepenyalahan undang-undang kerana rumah kediaman itu berada di atas tanah kerajaan dan suratikatan alang itu tidak mungkin melepaskan rumah kediaman itu kepada responden kerana kepenghunian tanah itu adalah tanpa kebenaran sah dari segi undang-undang dan boleh disabit di bawah s 425 Kanun Tanah Negara 1965.

(2) Walaupun kepenyalahan undang-undang itu tidak dihujahkan oleh perayu, mahkamah tidak akan menguatkuasakan suatu suratikatan alang yang berasaskan penghunian tanah kerajaan yang menyalahi undang-undang itu.

(3) Walaupun bapa responden memegang suatu lesen pendudukan sementara atas tanah kerajaan itu, lesen itu adalah untuk sementara sahaja dan tidak boleh dipindahmilik atas kematian bapa responden. Pengeluaran suatu lesen pendudukan sementara tidak akan menukarkan tanah kerajaan kepada tanah berimilik.

Obiter:

Sesuatu pihak kepada suatu tindakan boleh menukar peguamcaranya tanpa perintah mahkamah tetapi sehingga notis penukaran itu difailkan dengan mahkamah dan sesalinan notis itu disampaikan kepada semua pihak di dalam tindakan tersebut, peguamcara yang namanya berada di dalam rekod itu akan dianggap sebagai peguamcara pihak tersebut sehingga penyelesaian tindakan itu.]

Cases referred to

1 *Thorp v Holdsworth* [1876] 3 Ch D 637 (refd)
2 *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218; [1955] 3 All ER 864; [1956] AC 218 (refd)
3 *Spedding v Fitzpatrick* (1888) 38 Ch D 410 (refd)

4 *Blay v Pollard & Morris* [1930] 1 KB 628 (refd)
5 *London Passenger Transport Board v Moscrop* (1942) AC 332 (refd)
6 *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 (refd)
7 *Bigos v Bousted* [1951] 1 All ER 92 (refd)
8 *Leong Poh Chin v Chin Thin Sin* [1959] MLJ 246 (refd)
9 *Wai Hin Tin Mining Co Ltd v Lee Chow Beng* [1968] 2 MLJ 251 (refd)
10 *North Western Salt Co v Electrolytic Alkali Co* [1914] AC 461 (refd)
11 *Edler v Auerbach* [1950] 1 KB 359; [1949] 2 All ER 692 (refd)
12 *Gedge & Ors v Royal Exchange Assurance Corp* [1900] 2 QB 214 (refd)
13 *Re Mahmoud & Ispahani* [1921] 2 KB 716 (refd)
14 *Alexander v Rayson* [1936] 1 KB 169 (refd)
15 *Mason v Clarke* [1955] AC 778; [1955] 1 All ER 914; [1955] 2 WLR 853 (refd)
16 *Royal Exchange Assurance Corp v Vega* [1902] 2 KB 384 (refd)
17 *Clay v Yates* [1956] IH & N 73 (refd)
18 *Pearce v Brooks* (1866) LR 1 Ex 213 (refd)
19 *Shaw v Benson* (1883) 11 QBD 536; (1883) 52 LJQB 575 (refd)
20 *Wild v Simpson* [1919] 2 KB 544 (refd)
21 *Brightman v Tate* [1919] 1 KB 463 (refd)
22 *Bostel Bros v Hurlock* [1949] 1 KB 74; [1948] 2 All ER 312 (refd)
23 *Shackell v Rosier* [1836] 2 Bing NC 634 (refd)
24 *Mohamed Said v Fatimah* [1962] MLJ 328 (refd)
25 *Papoo v Veeriah* [1965] 1 MLJ 127 (refd)
26 *Fatimah v Moideen Kutty* [1969] 1 MLJ 72 (refd)
27 *Sidek bin Hj Muhamad & Ors v Government of the State of Perak & Ors* [1982] 1 MLJ 313 (refd)

Jula Singh (*Paramjit & Co*) for the appellant.
Lee Siew Lung (*Loh Poh Seng & Co*) for the respondent.

Abdul Malik Ishak JC: This is an appeal against the decision of the learned magistrate, Magistrates' Court, Taiping, Perak ('the trial court'), in giving vacant possession of premises known as No 24, Kampong Aman, Ulu Tupai, Pokok Assam, Taiping ('the said premises') erected on state land to the respondent.

The appellant (the defendant in the court below) had occupied the said premises and together with his late father by the name of Ponnusamy s/o Sellamuthu, built a house on it. It was on the invitation of his late father that the appellant occupied the said premises, renovated the house thereon ('the dwelling house') and remained in occupation with his wife and children since 1964. The said premises stood on state land and by a deed of gift dated 26 December 1974, Ponnusamy s/o Sellamuthu bequeathed, for love and affection, the dwelling house to his daughter, the respondent (the plaintiff in the court below). The deed of gift was properly executed, attested and stamped and it described the state land as being comprised under PTLM 125(47)(641/63–3524). Notwithstanding the deed of gift,

A the appellant continued to occupy, peacefully, the dwelling house. By a stroke of misfortune, Ponnusamy s/o Sellamuthu died on 14 July 1981 ('the deceased'). The appellant continued in occupation of the dwelling house without paying a single cent, by way of rental, to the respondent. By letter dated 23 December 1986, the respondent, through her solicitors, issued a notice to quit to her brother, the appellant. Naturally, the appellant contested
B the suit.

The trial court in giving judgment to the respondent had blundered and failed to consider that the respondent's claim was founded on an illegality as the dwelling house stood on state land and the deed of gift could not have divested the dwelling house to the respondent as the occupation of the state
C land was without lawful authority and punishable under s 425 of the National Land Code 1965 ('the Code').

It was argued that the appellant did not plead illegality and, therefore, the appellate court could not take notice of such illegality. It is true that where the defendant relies upon the defence of illegality, he should distinctly raise that defence by his pleading. The function of pleadings is to give fair
D notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties (see *Thorp v Holdsworth*[1] at p 619, *Esso Petroleum Co Ltd v Southport Corporation*[2]). It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. Under the old
E system of pleading, at common law, the procedure was to conceal as much as possible of what was going to be proved at the trial, *but under the modern day system* a party must so state his case that his opponent will not be taken by surprise (see *Spedding v Fitzpatrick*[3] at p 414 per Cotton LJ). Thus, a party is bound by his pleadings and his case is confined to the issues raised on the pleadings unless and until they are amended (*Blay v Pollard & Morris*[4] at p 634; *London Passenger Transport Board v Moscrop*[5]) *but* even *where*, as in the present appeal, *the illegality is not pleaded by the appellant*, this
F court will not enforce a deed of gift founded on unlawful occupation of state land which is illegal, or arises out of an illegal transaction, where the illegality is disclosed on the respondent's own evidence and on the
G respondent's statement of claim and it appears that the respondent was implicated therein (see *Scott v Brown, Doering, McNab & Co*[6] per Lindley LJ at p 728 where his Lordship was discussing the reluctance of the court to enforce a contract which was illegal and this was followed in *Bigos v Bousted*,[7] and, nearer home, is the case of *Leong Poh Chin v Chin Thin Sin*[8] where the court held that though the illegality had not been pleaded, it was
H the duty of the court to take the point although the litigant had not taken it. Likewise, Chang Min Tat J (as he then was) in *Wai Hin Tin Mining Co Ltd v Lee Chow Beng*,[9] held that the plaintiffs' claim was founded on an illegality as the loan was made from the company's funds in contravention of art 5 of the company's articles of association and certain provisions of the
I Companies Ordinance 1940 and that the court could take notice of the illegality although it was not pleaded by the defendant. For comparisons, see the following cases of *North Western Salt Co v Electrolytic Alkali Co*[10] (contract illegal for restraint of trade and adopted in *Edler v Auerbach*[11]);

Gedge & Ors v Royal Exchange Assurance Corp[12] (marine insurance illegal owing to 'ppi' clause); *Re Mahmoud and Ispahani*[13] (contract for sale in contravention of statutory order) and, lastly, *Alexander v Rayson*[14] (contract capable of being lawfully performed but to be used for an unlawful purpose). It may be useful to compare these cases with *Mason v Clarke*.[15] The court is empowered at its will to adjudicate the case according to the law even though the issue is not pleaded. Thus, where a statute makes a particular contract or class of contracts void, the court will refuse to allow an action to be maintained thereon, even though the objection is not pleaded and the parties do not desire to rely on it (see *Royal Exchange Assurance Corp v Vega*,[16] where the contract was invalid under s 93(3) of the Stamp Act 1891). But if, like the present appeal, the illegality is patent on the face of the statement of claim, it would be a good ground for an objection in point of law and this court is entitled to act upon it (*North Western Salt Co v Electrolytic Alkali Co*[10]).

My research further shows that no action can be brought on a promise to do an illegal act, or to do an act with an illegal object (*Clay v Yates*;[17] *Pearce v Brooks*;[18] *Shaw v Benson*[19] (agreement for service illegal under Apothecaries Acts); *Wild v Simpson*[20] (champertous agreement); *Brightman v Tate*[21] (contract for building without licence, and applied in *Bostel Bros v Hurlock*[22]); and no action can be brought on a promise the consideration for which is wholly or partly illegal or against public policy (*Shackell v Rosier*[23]). Bankes LJ succinctly said in *Re Mahmoud & Ispahani*[13] [at p 726] that there is no qualification to 'the established rule of law that the court will never lend its aid in the enforcement of a contract which is ab initio illegal...'.

So much on illegality, I shall now proceed on the other points.

Even if the deceased held a temporary occupation licence on the state land in question (see the legend PTLM 125 (47) (641/63–3524) appearing in the deed of gift) that the licence was temporary and not transferable and upon the death of the deceased on 14 July 1981, the licence expired. It follows, therefore, that at the time the plaintiff instituted the proceedings for vacant possession and other ancillary prayers, she had no right to the possession of the state land notwithstanding the presence of the deed of gift. The issuance of a temporary occupation licence to the deceased will not convert the state land into an alienated land. Simply put, after the issue of the temporary occupation licence, the land was still state land and the deceased had a mere licence to occupy it temporarily (see *Mohamed Said v Fatimah*,[24] *Papoo v Veeriah*[25] and *Fatimah v Moideen Kutty*[26]). It is now trite law that title to state land can only be acquired by the process of alienation effected in accordance with the provisions of the Code (*Sidek bin Haji Muhamad & Ors v Government of the State of Perak & Ors*[27]). There was no such alienation here.

Much fuss was made before the trial court and before me, in regard to the locus standi of Messrs Paramjit & Co, to appear and argue on behalf of the appellant. From the appeal record, it appears that Messrs Madhi, Param & Co prepared the statement of defence and acted for the appellant. On the day of hearing before the trial court, Messrs Madhi, Param & Co discharged themselves by letter from acting for the appellant. The trial

court proceeded with the trial in the absence of the appellant's counsel and thereafter reserved judgment. On the date of the judgment, Messrs Paramjit & Co appeared for the appellant by filing a notice of appointment of solicitor under O 11 r 2 of the Subordinate Courts Rules, 1980 ('the SCR') and this brought adverse criticism by the respondent's counsel. It is pertinent to point out that a party to an action may change his solicitor without an order of the court but, until the notice of the change is filed in court and a copy of it is served on all the other parties to the action, the solicitor whose name appears on record will be considered the solicitor of the party until the final conclusion of the action (see O 11 r 1(1) of the SCR). It is also clear that an application by a solicitor, who has ceased to act, for an order declaring that he has ceased to act must be in Form 25 and it must be supported by an affidavit stating the grounds of the application (O 11 r 5(2) of the SCR). The notice and the affidavit must be served on the party for whom the solicitor acted, unless the trial court otherwise directs. The order should be in Form 26 but such an order will not affect the rights of the solicitor and the party as between themselves (O 11 r 5(3) of the SCR). Clearly, therefore, from the appeal record, in discharging themselves from acting for the appellant, Messrs Madhi Param & Co had failed to comply with the rules as set out in the SCR and, likewise, Messrs Paramjit & Co, in acting for the appellant had failed to abide by the rules of the SCR. This means that on record, Messrs Madhi Param & Co is the counsel for the appellant until the final conclusion of the action.

Be that as it may, being state land, it is a formidable obstacle to the respondent to lay claim on it. Only the state authority can vest state land to the respondent by way of an alienation. Both the parties should consider themselves fortunate that the state authority had allowed their late father to stay on the state land and, it now appears, that the state authority is also allowing the appellant to squat on the same state land in question. The appellant is nothing but a squatter. Squatters have no right either in law or in equity. It is up to the state authority to decide on the next course of action. In the circumstances, the appeal is allowed. However, in view of the special features in the present appeal, there will be no order as to costs here and in the court below.

Appeal allowed.

Reported by Jeanne Tan